

13-1589 (L)
Gamoran v. Neuberger Berman LLC, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 28th day of October, two thousand thirteen.

PRESENT: DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
Circuit Judges,
JOHN G. KOELTL,*
District Judge.

- - - - -X
BENJAMIN M. GAMORAN, derivatively on
behalf of the nominal defendant with
respect to its series mutual fund,
the Neuberger Berman International
Fund,

Plaintiff-Appellant-Cross-
Appellee,

-v.-

13-1589, 13-1779, 13-1791

*Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 NEUBERGER BERMAN LLC, NEUBERGER BERMAN
2 MANAGEMENT LLC, BENJAMIN SEGAL, PETER
3 E. SUNDMAN, JACK L. RIVKIN, JOHN
4 CANNON, FAITH COLISH, C. ANNE HARVEY,
5 ROBERT A. KAVESH, HOWARD A. MILEAF,
6 EDWARD I. O'BRIEN, WILLIAM E. RULON,
7 CORNELIUS T. RYAN, TOM D. SEIP,
8 CANDACE L. STRAIGHT, PETER P. TRAPP,
9 NEUBERGER BERMAN EQUITY FUNDS, D/B/A
10 NEUBERGER BERMAN INTERNATIONAL FUND,
11 Defendants-Appellees-Cross-
12 Appellants,

13 - - - - -X

14
15 **FOR APPELLANT:** THOMAS I. SHERIDAN, III, Hanly
16 Conroy Bierstein Sheridan Fisher
17 & Hayes LLP, New York, New York.

18
19 **FOR APPELLEES:** NICHOLAS G. TERRIS (Jeffrey B.
20 Maletta, Theodore L. Kornobis,
21 on the brief), K&L Gates LLP,
22 Washington, DC.

23
24 DOUGLAS W. HENKIN (James N.
25 Benedict, Alan J. Stone, Matthew
26 J. Latterner, on the brief),
27 Milbank, Tweed, Hadley & McCloy
28 LLP, New York, NY.

29
30 Appeal from a judgment of the United States District
31 Court for the Southern District of New York (Griesa, J.).
32

33 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
34 **AND DECREED** that the judgment of the district court be
35 **AFFIRMED** in part, **VACATED** in part, and **REMANDED**.
36

37 Plaintiff Benjamin M. Gamoran appeals from the judgment
38 of the United States District Court for the Southern
39 District of New York (Griesa, J.), dismissing without
40 prejudice derivative claims against a mutual fund's trustees
41 and investment advisors.¹ Gamoran asserts claims under the

¹ Neuberger Berman Equity Funds ("Trust"), the nominal defendant, is a Delaware statutory trust and a registered investment company under the Investment Company Act of 1940.

1 Racketeer Influenced and Corrupt Organizations Act ("RICO"),
 2 18 U.S.C. § 1961 et seq., as well as state common law claims
 3 for breach of fiduciary duty, negligence, waste, and breach
 4 of contract. On appeal, Gamoran argues that the district
 5 court erred in (1) rejecting the sufficiency of his
 6 allegations that the board of trustees lacked independence
 7 and wrongfully refused Gamoran's demand, and (2)
 8 concluding that passive stock ownership in illegal online
 9 gambling businesses does not violate the Illegal Gambling
 10 Business Act of 1970, 18 U.S.C. § 1955 (the "Gambling Act").
 11 Defendants' cross-appeal argues that the district court
 12 abused its discretion in dismissing the complaint without
 13 (rather than with) prejudice. We assume the parties'
 14 familiarity with the underlying facts, the procedural
 15 history, and the issues presented for review.
 16

17 The Federal Rules require that a complaint alleging
 18 derivative claims "must be verified and must ... (3) state
 19 with particularity: (A) any effort by the plaintiff to
 20 obtain the desired action from the directors or comparable
 21 authority and, if necessary, from the shareholders or
 22 members; and (B) the reasons for not obtaining the action or
 23 not making the effort." Fed. R. Civ. P. 23.1(b). "Rule
 24 23.1 is a rule of pleading that creates a federal standard
 25 as to the specificity of facts alleged with regard to
 26 efforts made to urge a corporation's directors to bring the
 27 action in question." RCM Secs. Fund, Inc. v. Stanton, 928
 28 F.2d 1318, 1330 (2d Cir. 1991). "However, the adequacy of
 29 those efforts is to be determined by state law absent a
 30 finding that application of state law would be inconsistent
 31 with a federal policy underlying a federal claim in the
 32 action". Id.; see also Halebian v. Berv, 590 F.3d 195,
 33 204 (2d Cir. 2009) ("The underlying demand requirement, ...
 34 is ... governed by state law."). No such inconsistency with
 35 federal policy exists here; therefore, the sufficiency of
 36 Gamoran's substantive allegations of wrongful refusal to
 37 bring his claims - including his federal RICO claims - is
 38 determined under state law. The parties agree that Delaware
 39 law, adopted by the Fund's trust agreement, governs.
 40

41 The correct standard of review remains an open
 42 question. When the sufficiency of the allegations depends
 43 on the circumstances of the individual case, the standard of

The Neuberger Berman International Fund (the "Fund") is one of the Trust's 26 funds; it is not a distinct legal entity.

1 review for dismissals based on Rule 23.1 is abuse of
2 discretion. Halebian, 590 F.3d at 203. However, this Court
3 has suggested that de novo review may be more appropriate.
4 See, e.g., Scalisi v. Fund Asset Management, 380 F.3d 133,
5 137 n.6 (2d Cir. 2004) ("As we see it, when a trial court
6 rules on the legal sufficiency of a complaint the question
7 presented should be one of law."). We need not decide
8 between these standards because we would reach the same
9 conclusion under either.

10
11 Under Delaware law, the making of demand by a
12 shareholder is a concession of the independence and
13 disinterestedness of a majority of the board to respond.
14 Spiegel v. Buntrock, 571 A.2d 767, 777 (Del. 1990). A
15 demand places control of the derivative litigation in the
16 hands of the board of directors, and demand refusal is
17 reviewed under the traditional business judgment rule. Id.
18 at 785-86; Zapata Corp. v. Maldonado, 430 A.2d 779, 784 n.10
19 (Del. 1981). The business judgment rule presumes that the
20 board made its decision "on an informed basis, in good faith
21 and in the honest belief that the action taken was in the
22 best interests of the company." Spiegel, 571 A.2d at 774.
23 To plead wrongful refusal, "the shareholder plaintiff is
24 required to allege with particularity legally sufficient
25 reasons to call into question the validity of the Board of
26 Directors' exercise of business judgment." Levner v. Prince
27 Alwaleed Bin Talal Bin Abdulaziz Al Saud, 903 F. Supp. 452,
28 457 (S.D.N.Y. 1994) (internal citation and quotation marks
29 omitted), aff'd, 61 F.3d 8 (2d Cir. 1995). The only issues
30 to be examined are "the good faith and reasonableness of
31 [the board's] investigation." Spiegel, 571 A.2d at 777.
32 "[F]ew, if any, plaintiffs surmount this obstacle."
33 Stanton, 928 F.2d at 1328.

34
35 Gamoran made a demand. Compl. ¶ 117. Therefore, as a
36 matter of law, he cannot challenge the board's independence
37 to act on his demand, notwithstanding his allegations.
38 However, Gamoran can challenge the good faith and
39 reasonableness of the investigation. Gamoran alleges that
40 the board (1) improperly retained final decision-making
41 authority; (2) ignored Gamoran's letter requesting
42 information about the investigation and failed to provide
43 annotated summaries of witness interviews; and (3) refused
44 to allow Gamoran to inspect tolling agreements executed to
45 preserve the Fund's claims.

1 1. To enjoy the protection of the business judgment rule,
2 a board need not delegate final decision-making authority to
3 a special committee unless demand has been excused due to
4 the board's conflicts. Zapata Corp., 430 A.2d at 786. When
5 (as here) the shareholder has made a demand, he concedes the
6 ability of the board to respond, and the board may retain
7 authority to render a final decision. See Spiegel, 571 A.2d
8 at 777.

9
10 2. The board was not obligated to share information from
11 its investigation. See, e.g., Scattered Corp. v. Chicago
12 Stock Exchange, 701 A.2d 70, 77 (Del. 1997), overruled on
13 other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000)
14 ("The law in Delaware is settled that plaintiffs in a
15 derivative suit are not entitled to discovery to assist
16 their compliance with the particularized pleading
17 requirement ... in a case of demand refusal."). Upon
18 completing its timely investigation, the board furnished
19 Gamoran with a letter providing a thorough summary of the
20 board's process and reasoning. Nothing further was
21 required.

22
23 3. Gamoran does not allege that the board actually failed
24 to execute tolling agreements to preserve the Fund's claims.
25 Rather, he alleges that "despite repeated requests,
26 Defendants have steadfastly refused to provide a copy of the
27 purported tolling agreement so that Plaintiff can verify its
28 scope, language, execution date, or effectiveness in
29 preserving the Fund'[s] claims from unnecessary forfeiture."
30 Compl. ¶ 125. However, as discussed above, the board was
31 not required to give Gamoran a copy of the tolling
32 agreements, Scattered Corp., 701 A.2d at 77, and because
33 Gamoran was not legally entitled to inspect the agreements,
34 his allegation does not cast reasonable doubt on the good
35 faith of the board's investigation. The allegation is
36 insufficient to support a claim of wrongful refusal.

37
38 Because Gamoran's complaint fails to satisfy the Rule
39 23.1 pleading standards, we do not consider whether the
40 elements of the underlying claims were well-pleaded.
41 Specifically, we need not decide whether passive stock
42 ownership of illegal gambling businesses violates the
43 Gambling Act.

44
45 The cross-appeal argues that the district court abused
46 its discretion by failing to dismiss the complaint with
47 prejudice. At oral argument, Gamoran conceded that the

1 relief sought in the cross-appeal should be granted in the
2 event that he lost his appeal. Because we affirm the
3 district court's dismissal of all Gamoran's claims, the
4 claims should therefore be dismissed with prejudice.
5

6 For the foregoing reasons, and finding no merit in
7 Gamoran's other arguments, we hereby **AFFIRM** the judgment of
8 the district court in part, **VACATE** in part, and **REMAND** for
9 entry of judgment dismissing Gamoran's claims with
10 prejudice.
11

12 FOR THE COURT:
13 CATHERINE O'HAGAN WOLFE, CLERK
14

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", written in black ink. Overlaid on the signature is the official seal of the United States Second Circuit Court of Appeals. The seal is circular with a blue border containing the text "UNITED STATES" at the top and "SECOND CIRCUIT COURT OF APPEALS" at the bottom, separated by two stars. The center of the seal is white with the words "SECOND CIRCUIT" in blue.